



signature of claimant's supervisor, John E. Lyon. By claimant's calculation, April 3, 2008, would be the 10<sup>th</sup> day after March 20, 2008, excluding intervening weekends and holidays.

2. If claimant failed to provide timely notice, did claimant have just cause for failing to provide timely notice of this alleged accident? Claimant alleged that, since this accident supposedly happened on his 4<sup>th</sup> day of employment, he was reluctant to advise his supervisor as he feared that he would lose his job. Respondent argues that this is not just cause for the delay and the time within which notice can be provided should not be expanded based on claimant's argument.

### **FINDINGS OF FACT**

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Hearing Order should be reversed and the matter remanded to the ALJ for further proceedings consistent with this Order.

Claimant began working for respondent on approximately March 13, 2008, as a physical laborer. On March 20, 2008, which was claimant's 4<sup>th</sup> day of actual work, claimant fell while hanging a tote bag of product. Claimant got up from the catwalk on which he was working and continued performing his job for several days. Claimant testified at the preliminary hearing that he told his supervisor, John E. Lyons, the next day that he fell and that his right shoulder was hurting.<sup>2</sup> However, respondent notes that claimant advised Richard E. Polly, M.D., of Kansas Orthopedics & Sports Medicine, that he fell and his shoulder began hurting several days after the fall.<sup>3</sup>

The Report was prepared by claimant with a date of April 4, 2008. However, on the second page of the Report, claimant signed the Report above the line listed as the "Date Report Completed" which indicates a date of April 3, 2008. Directly under the date of completion is the line listed as "Supervisor's Signature", next to the signature of John E. Lyons. The Report was then reviewed by the HR department on April 4, 2008.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>4</sup>

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<sup>2</sup> P.H. Trans. at 57, 70.

<sup>3</sup> P.H. Trans. at 72, Cl. Ex. 13.

<sup>4</sup> K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>5</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>6</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>7</sup>

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.<sup>8</sup>

K.S.A. 44-520 goes on to say:

The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .<sup>9</sup>

Claimant testified that he told his supervisor, John E. Lyons, the next day of his fall and the fact that his right shoulder was hurting.

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<sup>5</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>6</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>7</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>8</sup> K.S.A. 44-520.

<sup>9</sup> K.S.A. 44-520.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.<sup>10</sup>

While normally this testimony would appear uncontradicted, respondent argues that the information provided to Dr. Polly raises a question as to claimant's credibility and when or if claimant's right shoulder pain began. Claimant only has 10 days from the date of the accident to provide notice of the accident to respondent. If claimant did not tell Mr. Lyons of the accident as alleged, then the next opportunity for claimant to provide notice would be with the creation of the Report. On its face, it appears that the Report was initially created and signed by claimant and Mr. Lyons on April 3, 2008. Claimant is correct that April 3, 2008, would be the 10<sup>th</sup> day after the date of accident, if Saturdays, Sundays and holidays are excluded from the calculation.

Respondent argues that a strict interpretation of K.S.A. 44-520 does not allow such a calculation. K.S.A. 44-520 does not clarify how the 10-day limit is to be counted. The dispute regarding how to calculate a time period of 10 days or less under the Kansas Workers Compensation Act (Act) was determined by the Kansas Court of Appeals in *McIntyre*.<sup>11</sup> In *McIntyre*, the Court was asked to determine how the 10-day period for filing an application for review of a workers compensation award under K.S.A. 44-551 and K.A.R. 51-18-2 was calculated. The Court, after determining that the Act was silent on whether Saturdays, Sundays and holidays were to be counted, held that where the Act is silent as to how the days are to be calculated, then K.S.A. 60-206(a), a generally applicable statute, was to be applied to settle the argument. In K.S.A. 60-206(a), Saturdays, Sundays and legal holidays are specifically excluded from the computation when dealing with time periods of less than 11 days. In an apparent response to *McIntyre*, the Kansas legislature amended K.S.A. 44-551 to specifically exclude Saturdays, Sundays and legal holidays from the 10-day calculation method effective July 1, 1997.

K.A.R. 51-17-1 states:

**Saturdays, Sundays and holidays excluded.** The time within which an act is to be done shall be computed by excluding the first day and including the last; if the last day be a Saturday or Sunday or a statutory holiday, it is to be excluded.

The Kansas Supreme Court, in *Bain*,<sup>12</sup> then considered the application of the *McIntyre* holding when dealing with the notice statute, K.S.A. 44-520. The Court then compared the language of K.S.A. 44-520, the holding in *McIntyre* and K.A.R. 51-17-1, which did not specifically exclude Saturdays, Sundays and legal holidays from the

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<sup>10</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

<sup>11</sup> *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

<sup>12</sup> *Bain v. Cormack Enterprises, Inc.*, 267 Kan. 754, 986 P.2d 373 (1999).

calculation. Noting that K.S.A. 44-520 is silent as to the method of computation, the Court determined that K.A.R. 51-17-1, by providing a more limited time than is provided in K.S.A. 60-206(a), conflicts with statutory authority. The Court went on to find that when an agency regulation exceeds the statutory authority of the agency and conflicts with an applicable statute, the regulation is invalid and void. K.A.R. 51-17-1 was revoked, effective June 21, 2002.

Respondent argues that the language of K.S.A. 44-520 is clear and unambiguous in failing to exclude Saturdays, Sundays and legal holidays from the calculation of the 10-day time period. Therefore, under *Casco*,<sup>13</sup> to add the extra days into the calculation is to read into the statute that which is not contained in the legislative language. Thus, under K.S.A. 44-520, the calculation would be 10 calendar days after the date of the accident, and claimant's notice would be late. This Board Member, however, considers the rulings in both *McIntyre* and *Bain* to be controlling. K.S.A. 44-520 remains silent as to how the 10-day limit is to be calculated. Therefore, the courts will look at statutory interpretation to determine the method to be properly utilized. The logic of *McIntyre* and *Bain* is still good law. The general application of K.S.A. 2007 Supp. 60-206(a) remains. As noted in *Bain*, "... where the legislature has chosen to remain silent as to the method by which the time period is to be computed, the method prescribed in K.S.A. 60-206(a) applies."<sup>14</sup>

In calculating the 10 days from March 20, 2008, this Board Member finds the 10<sup>th</sup> day to be April 3, 2008. Therefore, claimant's notice to respondent of the accident was timely. This renders moot the issue of just cause.

The Order of the ALJ is reversed and this matter is remanded to the ALJ for further proceedings consistent with this Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>15</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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<sup>13</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, reh. denied (May 8, 2007).

<sup>14</sup> *Bain, supra*, at 758-759.

<sup>15</sup> K.S.A. 44-534a.

**CONCLUSIONS**

Claimant provided timely notice of his alleged accident, and the Order of the ALJ is reversed and the matter remanded to the ALJ for further proceedings consistent with this Order.

**DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated August 6, 2010, should be, and is hereby, reversed and the matter remanded to the ALJ for further proceedings consistent with this Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2010.

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HONORABLE GARY M. KORTE

c: John J. Bryan, Attorney for Claimant  
Meredith L. Moser, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge